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No. 98-153

In The

Supreme Court of the United States

October Term, 1997

KEVIN N. FLYNN and RANDY WOLFSON,

Petitioners,

v.

CITY OF BOSTON, THOMAS MENINO
and EVELYN RIESENBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the First Circuit Court of Appeals properly affirmed summary judgment, entered for the Respondents by the United States District Court for the District of Massachusetts, where Petitioners held policy making positions within a municipal agency which were fairly subject to a political test;

Whether the First Circuit Court of Appeals properly affirmed summary judgment, entered for the Respondents by the United States District Court for the District of Massachusetts, where Petitioners failed to adduce evidence to support their claim that they were terminated from their positions in retaliation for their exercise of their First Amendment right of free speech;

Whether the First Circuit Court of Appeals properly affirmed summary judgment, entered for the Respondents by the United States District Court for the District of Massachusetts, that Respondents' interest as employer outweighed Petitioners' rights to criticize the employer.

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OPINIONS BELOW

The Opinions of the United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts are reproduced in the Appendices to the Petition (hereinafter "A.: __). (A-1a, A-22a).

STATEMENT OF JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. § 1254 and respondents are satisfied with this statement of jurisdiction.

STATEMENT OF THE CASE

Respondents are not satisfied with the Statement of the Case presented in the Petition as it contains misstatements of the record below. Respondents submit the following Statement of the Case, taken from the opinions issued by the First Circuit and District Court:

Petitioners were discharged from their positions with the Boston Community Centers ("BCC"), a City of Boston agency with approximately 400 employees and an annual budget of approximately $15 million dollars. The agency is concerned with the delivery of social services to city residents.

In January 1994, the newly elected Mayor of the City of Boston appointed Evelyn Riesenberg, formerly one of his special assistants, as the Executive Director of BCC. Flynn and Wolfson were at that time two of the four senior management of BCC who reported directly to the Director. Flynn's job duties included authority over human resource issues, supervision of grants managers and personnel director, labor negotiations, and liaison responsibilities with a number of city and state agencies.

Wolfson supervised approximately half of BCC's neighborhood sites, oversaw programs provided to City residents (such as an after-school athletic league), served as liaison to two city agencies, oriented new council members, and monitored compliance with legal requirements.

Taking the facts in the light most flattering to the petitioners for purposes of summary judgment only, respondents conceded that Riesenberg asked petitioners to inform her of the political affiliation of other employees within BCC; ordered petitioner Flynn to process a pay raise for an employee in violation of the union contract, and mishandled several sexual harassment complaints and related personnel actions, despite petitioners' objections.

In August 1994, Riesenberg terminated all four associate directors, asserting that she was reorganizing the agency. Petitioners protested and threatened litigation if they were not reappointed. In response, Corporation Counsel for the City of Boston wrote to petitioners that their termination was due to the reorganization of the agency and an evaluation of their performance. Petitioners allege that these reasons were pretextual.

Suit was filed in the United States District Court for the District of Massachusetts, pursuant to 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendments and state statutory and common law claims. The District Court dismissed several claims after hearing on Respondents' motion to dismiss and, at summary judgment, entered judgment for the Respondents on the remaining counts of the complaint. The District Court held that the Petitioners were confidential employees, such that political loyalty and affiliation were appropriate job requirements, and further held that the "speech" for which they claimed to have suffered retaliation was not subject to the protections of the First Amendment.

The Court of Appeals for the First Circuit affirmed, holding that public employees holding confidential, mid- or upper-level positions, who are dismissed for political grounds, are not entitled to the First Amendment's protections against politically motivated discharge. The First Circuit also affirmed summary judgment on the petitioners' retaliation claim, holding that even if petitioners were terminated due to their speech on issues related to the operation of the BCC office, the terminations were lawful as Riesenberg was permitted to conclude that she did not have the confidence and trust in petitioners necessary to retain them.

The First Circuit reversed summary judgment on the pendant state law claims, and remanded those claims to the state court. The order of remand was stayed pending resolution of the petitioners' writ to this Court.

REASONS FOR DENYING THE WRIT

The District Court and the First Circuit Court of Appeals properly applied the fact-specific test, outlined by this Court in *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980), for determining whether Petitioners were confidential employees, and properly concluded that Petitioners fit within the narrow category of public servant for whom party affiliation was an appropriate job qualification.

The lower courts also extended their analysis to Petitioners' separate claims of retaliation for protected speech, and in so doing, applied the analysis developed by this Court in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1982). Again, the lower courts correctly concluded that even if Petitioners could demonstrate that their speech was on issues of public concern, an application of the *Pickering* balancing test mandated judgment for the respondents.

Petitioners' arguments that the First Circuit was "confused" about how to administer the joint application of the *Elrod/Branti* and *Pickering* doctrines, and that the decision in this case created a "new rule," are incorrect. The First Circuit considered both the *Elrod/Branti* issues and the *Pickering* analysis of the Petitioners' speech *seriatim*, and in so doing applied consistently the rule first articulated by this Court in *Waters v. Churchill*, 511 U.S. 661, __, 114 S. Ct. 1878, 1886 (1994), namely that a high ranking governmental official enjoyed fewer First Amendment protections than did a low ranking employee or private citizen. (A:8a). Petitioners' predictions that other circuits would have reached different results are irrelevant in light of the propriety of the First Circuit's application of the law.

The Petitioners' argument that state law forbidding coerced political contributions or activity, and a local ordinance governing the contents of local ballots, somehow trump Supreme Court First Amendment jurisprudence is without authority or applicability to this dispute.

I.

THE LOWER COURTS PROPERLY FOUND THAT PETITIONERS OCCUPIED POLICYMAKING POSITIONS.

The First Amendment prohibits the dismissal of public employees based solely upon party affiliation, unless the employer can demonstrate that party affiliation is an appropriate requirement of the employee's position. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The First Amendment also enjoins the dismissal of a public employee in a non-policy making position solely because of his or her political affiliation or lack of political sponsorship. *Branti v. Finkel*, 445 U.S. 507, 516-517 (1980).

Although fact intensive, the question of whether a governmental position is "political" is a question of law to be determined by the court. *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 12 (1st Cir. 1996) (citing *McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 93 (1st Cir. 1989) (Breyer, J.)). "Whether a government position is 'political' does not depend on . . . labels . . . but on the *substance of the duties inherent in the position itself*." *Id.* at 12 (emphasis in original). The court first asks whether the overall functions of the agency involve

> decisionmaking on issues where there is room for political disagreement on their goals or implementation? . . . [T]he next step is to examine the particular responsibilities of the position to determine whether it resembles a policy maker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement.

Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241-242 (1st Cir. 1986) (en banc).

BCC is an agency of the City of Boston, composed of forty one community centers throughout the City, which implement recreational, educational, senior, child care, youth work and other community programs. BCC has an approximate total of 400 employees and a total budget of some $15 million. Accordingly, the uncontested facts establish that the overall functions of BCC involve decisionmaking in which there is room for political disagreement, thus satisfying the first prong of the *Jimenez Fuentes* test.

Further, both Petitioners' own description of their job responsibilities demonstrate that they acted as high level,

confidential employees for whom political affiliation was an appropriate requirement. An employee's own testimony regarding his or her actual job duties is often dispositive of the employee's status as a confidential employee. *Jimenez Fuentes*, 807 F.2d at 244-245; *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir. 1993). Such is the case here. Flynn acknowledged, both in the amended complaint and at deposition, that as the associate director of administration and finance at BCC, he worked as the direct liaison to many City departments, as well as with various state and federal agencies, had oversight of all finance and personnel functions within the BCC, was responsible for preparation and implementation of the department budget and the supervision of state, federal and private grant management, management of the agency's payroll and contract functions. He also provided fiscal, legal and personnel assistance to the non-profit corporate arms of the centers. Flynn testified that, during the annual preparation of the BCC budget, he established a budget committee, worked with the treasurer of the Citywide Board to prepare for briefings with the City Budget Department, and would prepare the Director for City Council budget hearings. Flynn also acted as liaison to the City's Law Department and Labor Relations Department. With regard to the Labor Department, when the BCC senior staff began to organize, Flynn was "appointed the lead negotiator for labor relations."

As the lower courts correctly held, Flynn's description of his duties with the BCC demonstrate that he was exactly the type of confidential employee for whom political affiliation is an appropriate job requirement. Flynn performed duties that entailed policymaking, representational activities, ministerial duties, and personnel oversight. *See Jimenez Fuentes*, 807 F.2d at 244; *O'Connor*, 994 F.2d at 911 (1st Cir. 1993). In reporting to the Executive Director, and as liaison to City departments (including the Law Department and as representative of BCC

for labor relations matters), Flynn was privy to confidential information. As an Associate Director with oversight of a $15 million plus budget and as the Executive Director's designee for hirings, purchasing and expenditures, Flynn proposed, established and implemented policy. These major responsibilities meant that policy disagreements with his politically appointed supervisor could lead to less effective implementation of political goals. Flynn was therefore sufficiently responsible for policymaking at the BCC to make his position one for which political affiliation was an appropriate requirement. *Jimenez Fuentes*, 807 F.2d at 245.

Similarly, plaintiff Wolfson, as BCC's Associate Director of Field Services, occupied a position for which political affiliation is an appropriate job requirement. She alleged and testified that her responsibilities included overseeing the operations at twenty community centers, including recreation aquatics, programming, personnel, and budgets, monitoring the various programs of the BCC for compliance with municipal, state and federal regulations, providing technical assistance to the non-profit corporate arms of the centers, writing the operational and non-profit fiscal compliance manuals for the agency, and supervision of capital improvements, maintenance, and repairs. Wolfson was the liaison between the BCC and the City of Boston's Public Facilities Department and the Real Property Department. Wolfson also drafted a manual for BCC, an orientation packet for council members, and a transition report when Thomas M. Menino became Mayor that included a program profile for BCC. Wolfson testified that her position entailed orientation for the new members as requested and development of new advisory boards. Wolfson could also recruit and present candidates for employment, and on some occasions would recommend finalists for the Executive Director after she had screened and interviewed applicants. As the district court properly concluded, Wolfson was privy to confidential

information. She had greater interaction with the public than did Flynn, and had the authority to represent top management of the organization to the community and the BCC's 400 employees. She handled matters that were "potentially subject to partisan political differences" and her job "involved at least a modicum of policymaking responsibility." *Mendez-Palou v. Rohena Betancourt*, 813 F.2d 1255, 1258-1259 (1st Cir. 1987).

The Petitioners incorrectly argue that the First Circuit applied a "weakened" *Branti* test which incorrectly resulted in the conclusion that policymaking duties were inherent in Petitioners' positions. Petitioners also argue that the law on this issue throughout the Circuits is so confused as to be in need of clarification by the Supreme Court. Neither position has merit.

Petitioners misapprehend the First Circuit's rejection of a "mechanical formula" based solely on titles rather than on actual duties for a "weakened test." In fact, the First Circuit has consistently applied the fact-specific test first enunciated by this Court in *Branti*, which rejected reliance on job labels, and instead required the lower courts to examine the "substance of the duties inherent in the position itself." *Branti*, 445 U.S. at 518. The First Circuit appropriately focused on the duties Petitioners described at deposition in determining that the Petitioners were high level, confidential employees for whom a political loyalty was a legitimate requirement. Thus, in the First Circuit, low level positions within local governments (the majority of the workers in most agencies of government) are provided protection against politically motivated firings, while high level employees who are "significantly connected to policy-making" are not. (A:4a). As dicta in *Branti* suggests, a public employer may reasonably believe that the official duties of employees who "explain [the official's] views . . . or communicate with the legislature cannot be performed

effectively unless those persons share [her] political beliefs and party commitments." *Branti*, 445 U.S. at 518. The First Circuit's decision demonstrates that it appropriately conducted the fact specific inquiry into the duties that Flynn and Wolfson each performed, and properly concluded that those duties — acting as liaison and delegate in legal and labor negotiations, representing the face of the agency to employees and city residents — properly implicated the duties of a high level, confidential official for whom party affiliation was a proper requirement of the position. This analysis is squarely in line with that articulated by this Court in *Branti*. The First Circuit did not misapply the *Branti* analysis[1].

II.

THE LOWER COURTS PROPERLY APPLIED THE *PICKERING* AND *CONNICK* BALANCING TESTS TO PETITIONERS' "SPEECH," AND PROPERLY CONCLUDED THAT THE BALANCE OF INTERESTS FAVORED THE EMPLOYER.

It is beyond serious dispute that governmental employees have no First Amendment protections when the speech in question addresses matters of purely private concern:

> When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in

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1. Petitioners' claims that other circuits would have reached results different from the First Circuit's conclusion in this matter is without weight. As the First Circuit has properly applied the common law as developed by the Supreme Court in this area, the results reached in other jurisdictions have no bearing on the validity of the decision at issue here.

> managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — *and certainly every criticism directed at a public official* — would plant the seed of a constitutional case. *Connick v. Myers*, 461 U.S. 138, 146-147, 149 (1982) (emphasis added).

The District Court considered Petitioners' claims that they were terminated in retaliation for their criticisms of the mishandling of sexual harassment complaints and the "politicizing" of employment practices within the BCC, and concluded that

> [T]he difficulty is that there is no evidence that this is true. Petitioners offer nothing that suggests a coverup or "suppression" of sexual harassment claims by Riesenberg. . . . In other respects, Petitioners exaggerate the record. There is little or no evidence that they voiced any objection to [Riesenberg's alleged hiring practices], however much they may have privately disagreed with her actions. . . . Speech unexpressed can hardly raise a subject of public concern or be a basis for retaliation. Petitioners' vocal disagreements with Riesenberg over possible violations of the terms of a federal grant and a collective bargaining agreement fall within the category of internal office speech that *Connick* places altogether outside the protection of the First Amendment. (A:44a-45a).

Although the First Circuit did not reach the issue of whether the content of the Petitioners' speech was deserving of First Amendment protection, the District Court's *Connick* analysis

is dispositive: Petitioners can have no First Amendment claim for retaliation when the record at summary judgment is bereft of evidence that their speech was on any issue of public concern.

Further, the courts have held that the First Amendment rights of governmental employees are not absolute, even in those instances where the speech at issue concerns matters of public concern. *See Connick*, 461 U.S. at 148. Rather, the courts recognize the particular concerns of the government in its role as an employer, and measure the employee's interest in speaking against the disruption to the workplace that can flow from that speech. This Court established a balancing test, articulated in *Pickering v. Bd. of Ed. of Township High School Dist. 205 Will Cty.*, 391 U.S. 563 (1968), which considers the governmental employer's interest in the functioning of the government agency without interruption, against the employee's interest in contributing to the public debate.

Recognizing these long established principles, the First Circuit concluded that Petitioners, high level employees within the BCC, could be discharged from their positions both for political reasons, and for speech which touched on matters of public concern. "Indeed, without this congruence, the latitude allowed to the superior by the Supreme Court could be effectively nullified." (A.10a). Petitioners complain that the First Circuit has, by so deciding, created a "new rule" out of whole cloth which is in conflict both with the holdings of this Court and with that of other circuits. Their argument is erroneous.

The First Circuit has merely restated what this Court has previously held:

> [t]hough a private person is perfectly free to uninhibitedly and robustly criticize a state

> governor's legislative program, *we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing* . . . The public interest in the efficient delivery of government services is served by minimizing disruption in the government workplace. Consequently, we give deference to government predictions of harm even where unwelcome speech involves no "tangible, present interference with [an] agency's operation." *Waters v. Churchill*, 114 S. Ct. 1878, 1886-87 (1994) (emphasis added). Thus, a high level official of a local government may be "fired" if he criticizes the policies of the incumbent official, regardless of the wisdom of those policies or the trenchant nature of the critique.

Despite Petitioners' calls of alarm, this rule appropriately demonstrates that an individual who chooses to work as a government employee, and who chooses to accept the responsibility of working closely with elected officials, necessarily surrenders some right to criticize those officials — at least if the employee wants to retain the position. As this Court has carefully articulated, "[t]he First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge, . . ." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 (1990), but

> [a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.

Local government officials also have a legitimate interest in ensuring that dissident statements from high-ranking officials are not confused with the statements of the incumbent, thus undermining the legitimacy of government in the eyes of the

public. *Board of Cty. Comm'rs, Wabaunsee County v. Umbehr*, U.S. __, 116 S. Ct. 2342, 2347-2348 (1996) (citations omitted). Thus, this Court in *Umbehr* held that a local government's "interest in achieving its goals as effectively and efficiently as possible" was a significant one when it acted as an employer. Similarly, courts have recognized a legitimate need for governments to rely on loyal staffers in order to fulfill electoral promises:

> In order for the new administration to be given an opportunity to fulfill expectations, it must have available and also appear to have available significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure . . .

Jiminez Fuentes v. Torres Gaztamibe, 807 F.2d 236, 241 (1st Cir. 1994).

The First Circuit's conclusion, namely that high ranking employees may be terminated for reasons relating to political affiliation *and* in response to speech on matters concerning the operation of the agency, is thus clearly within the precedents issued by this Court. Indeed, the position pressed by the respondents would effectively remove *any* discretion in hiring or firing decisions from the elected official. The result would be that a high level government official could "confer tenure on himself by opportunistic denunciations of his employer's policies." (A.35a). Such a result would emasculate the powers of elected officials, nullify local elections, and would remove the functioning of municipal governments from the electorate and place it in the hands of life-long bureaucrats. Such a rule is without basis in the law, or indeed, in the workings of a democratic society.

III.

STATE LAW DOES NOT MANDATE REJECTION OF FIRST AMENDMENT JURISPRUDENCE.

Petitioners cite Massachusetts General Laws chapter 55, section 16 for the proposition that their terminations were unlawful. The statute prohibits any attempt to coerce financial contributions or political service. Nothing in the record supports any claim that Petitioners were coerced into donating to any political party. Nothing in the record supports Petitioners' claims that they were forced to provide political service to any political party or person. The City of Boston ordinance cited by Petitioners governs the substance of ballots used in municipal elections. This ordinance is wholly inapplicable to the issues in this litigation. The Petitioners' federalist argument should be disregarded in evaluating their petition for certiorari.

IV.

JUDGMENT PROPERLY ISSUED FOR RESPONDENTS THOMAS MENINO AND THE CITY OF BOSTON AND SHOULD NOT BE REVISITED.

Respondents submit that the Petitioners have waived any appeal of the entry of summary judgment for Thomas Menino individually, and for the City of Boston, as Petitioners have failed to brief any argument against entry of judgment for these Respondents either at the First Circuit or in their petition for certiorari. However, Petitioners have named both the City and the Mayor as respondents in their petition. As Petitioners have failed to raise any appeal of the District Court's ruling in favor of the City and the Mayor, those issues are waived and this Court should decline to consider any argument offered by Petitioners on the issue of either the Mayor's or the municipality's liability.

Supreme Court Rule 14.1(a) makes clear that "[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a). Additionally, this Court has held that it will "not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638, 645 (1992). As Petitioners have failed to raise any issue concerning the Mayor or the City in their petition for certiorari, no claims against these Respondents should be entertained by this Court, notwithstanding the inclusion of these Respondents as respondents in the Petitioners' petition.

CONCLUSION

For the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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